Khoo Chee Peng v Menteri Hal Ehwal Dalam Negeri & Ors

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44–22–98
ABDUL WAHAB J
8 AUGUST 1998

Preventive Detention *— Detention — Other similar place authorized generally or specifically by the Minister — Whether detention period when applicant was warded in hospital was bad — Emergency (Public Order and Prevention of Crime) Ordinance 1969 s 3*

Preventive Detention *— Detention — Application for habeas corpus — Allegation of assault — Whether wrong to apply for writ of habeas corpus — Whether issue of assault is relevant in application for habeas corpus*

Preventive Detention *— Detention — Period of detention — Expiry of — Whether authorization for further detention was given after lapse of earlier detention*

Preventive Detention *— Detention order — Detention under Emergency (Public Order and Prevention of Crime) Ordinance 1969 — Failure to use word 'consider' in making recommendations — Whether Advisory Board had actually considered applicant's representation — Emergency (Public Order and Prevention of Crime) Ordinance 1969 s 6(1)*

The applicant was arrested in September 1997 and served with a detention order under s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance'). The applicant filed an application for a writ of habeas corpus on the grounds that: (i) when he was detained under s 3 of the Ordinance, he was warded at the Kuala Lumpur General Hospital from 23 October 1997 to 26 October 1997. The applicant could not be said to be in lawful custody since the hospital does not come within the meaning of any other similar place authorized generally or specifically by the Minister as stipulated in s 3. Therefore, for the period between 23 October 1997 and 26 October 1997, the detention was bad; and (ii) the applicant was assaulted when he was detained under s 3 of the Ordinance. In submission, other grounds — which were not pleaded — were put forward, inter alia: (i) the respondents had not strictly complied with s 6(1) of the Ordinance in that the affidavit did not say that the Advisory Board had actually considered the applicant's representation; and (ii) the further detention for 28 days was authorized commencing from 21 September 1997 at 3.25am. As the proviso to s 3(3)(b) of the Ordinance mentions hours, the authorization lapsed on 18 October 1997 at 3.25am. Therefore, when the police sent the report on 18 October 1997 at 7.45am, the authorization had lapsed.

Held, dismissing the application:

(1) The applicant was sent to the hospital because of his illness. If the applicant's argument were adopted, he should not have been sent to the hospital or allowed to be warded when he was ill. Such an interpretation would lead to an inhumane and ludicrous result (see p 653B–C); *Koh Yoke Koon v Minister for Home Affairs, Malaysia & Anor* [1988] 1 MLJ 45 distinguished.

(2) Complaints of assault are, generally, in the nature of complaints of manner and conditions of detention and have little to do with compliance of the legal requirements authorizing detention. Remedies other than habeas corpus were available to the applicant. It would be wrong to apply for writ of habeas corpus for such cases. Therefore, the issue of whether there was an assault is irrelevant in an application for a writ of habeas corpus. In any event, there was little factual substance in support of the ground now being pursued even if assault is a factor to be considered in habeas corpus applications (see pp 654D–E and 655F); *Morgan all Perumal v Ketua Inspektor Hussein bin Abdul Majid* [1996] 3 MLJ 281 followed.

(3) The affidavit must make assertions that there was compliance with the direction of s 6(1). Mere failure to use the word 'consider' does not mean that the Advisory Board had not considered the matter. The process of hearing representations and making recommendations thereon necessarily implies consideration before making recommendation. There was no suggestion that the Advisory Board merely conveyed the representations, which would have been in breach of s 6(1) (see p 657C–E).

(4) The officer concerned exercised the power under s 3(3)(b) to detain for a period of 28 days. He had stated it was from 21 September 1997 at 0325hrs. He did not say 'from 21 September 1997' when argument raised might have been relevant. A day is a period of 24 hours. If the commencement time is not specified, then s 54(1)(a) of the Interpretation Act 1957 would apply. But where a specific time is stated for the commencement of the time period, then the period begins from that time. The authorities cited may be distinguished on the basis that the times mentioned were the time when the officer signed the document, not as to time the order was effective from. The officer had not exceeded the powers given to him under s 3(3)(b). He had exercised it before the expiry of the previous order, and the period he specified in the order did not exceed the power conferred by s 3(3)(b) of the Ordinance (see p 658F–H).

Obiter:

If objection had been made that the grounds were not pleaded, the grounds would have been summarily dismissed. However, although the issue was not pleaded, if there was a body of evidence that was admitted to support it, the court has a duty to consider the evidence and the submission and come to a decision. In the present case, the

respondents, having unnecessarily filed the various documents instead of merely answering the specific allegations in the supporting affidavits, invited upon themselves the submissions in the grounds which were not pleaded (see p 656A, E–F); *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 followed.

[**Bahasa Malaysia summary**

Pemohon telah ditangkap dalam bulan September 1997 dan disampaikan dengan perintah penahanan di bawah s 4(1) Ordinan Darurat (Perintah Am dan Pencegahan Jenayah) 1969 ('Ordinan tersebut'). Pemohon telah memfailkan permohonan untuk satu writ habeas corpus atas alasan bahawa: (i) ketika beliau ditahan di bawah s 3 Ordinan tersebut, beliau telah dimasukkan ke wad di Hospital Besar Kuala Lumpur daripada 23 Oktober 1997 hingga 26 Oktober 1997. Pemohon tidak boleh dikatakan berada dalam jagaan yang sah di sisi undang-undang oleh kerana hospital tersebut tidak terlingkung di bawah maksud mana-mana tempat serupa yang dibenarkan secara umumnya atau secara khususnya oleh Menteri sepertimana yang ditetapkan dalam s 3. Dengan itu, bagi tempoh antara 23 Oktober 1997 dan 26 Oktober 1997, penahanan tersebut adalah tidak wajar; (ii) pemohon telah diserang ketika beliau berada dalam tahanan di bawah s 3 Ordinan tersebut. Dalam penghujahan, alasan-alasan lain — yang tidak diplidkan — telah dikemukakan, antara lain: (i) penentang-penentang telah tidak dengan tegasnya mematuhi s 6(1) Ordinan tersebut iaitu afidavit tersebut tidak menyatakan bahawa Lembaga Penasihat telah sebenarnya mempertimbangkan representasi pemohon; dan (ii) penahanan selanjutnya selama 28 hari telah dibenarkan bermula daripada 21 September 1997 pada jam 3.25 pagi. Oleh kerana peruntukan kepada s 3(3)(b) Ordinan tersebut menyebut jam, kebenaran itu luput pada 18 Oktober 1997 pada jam 3.25 pagi. Dengan itu, ketika polis menghantarkan laporan tersebut pada 18 Oktober 1997 pada jam 7.45 pagi, kebenaran tersebut telah pun luput.

Diputuskan, menolak permohonan:

(1) Pemohon telah dihantar ke hospital kerana penyakitnya. Jika hujah pemohon diterima-pakai, beliau seharusnya tidak dihantarkan ke hospital atau dibenarkan untuk dimasukkan ke wad ketika beliau sakit. Pentafsiran sedemikian akan membawa kepada hasil yang tidak berperikemanusiaan dan mustahil (lihat ms 653B–C); *Koh Yoke Koon v Minsiter for Home Affairs, Malaysia & Anor* [1998] 1 MLJ 45 dibeza.

(2) Aduan-aduan mengenai serangan adalah, secara amnya menurut sifat aduan, mengenai cara dan keadaan penahanan dan tidak mempunyai kaitan dengan pematuhan kehendak-kehendak sah yang membenarkan penahanan. Remedi-remedi selain daripada habeas corpus ada untuk pemohon. Adalah salah untuk memohon bagi mendapatkan writ habeas corpus bagi kes-kes yang

sedemikian. Dengan itu, isu mengenai sama ada terdapatnya serangan adalah tak relevan dalam sesuatu permohonan untuk writ habeas corpus. Dalam sebarang keadaan, terdapat hanya sedikit kebenaran faktual bagi menyokong alasan yang dicari walaupun jika serangan menjadi satu faktor untuk dipertimbangkan dalam permohonan-permohonan habeas corpus (lihat ms 654D–E dan 655F); *Morgan a/l Perumal v Ketua Inspektor Hussein bin Abdul Majid* [1996] 3 MLJ 281 diikut.

(3) Afidavit tersebut seharusnya menekan bahawa pematuhan arahan s 6(1) telah dilakukan. Kegagalan semata-mata untuk menggunakan perkataan 'mempertimbangkan' tidak bermakna bahawa Lembaga Penasihat telah tidak mempertimbangkan perkara tersebut. Proses mendengar representasi dan membuat pengesyoran ke atasnya semestinya menunjukkan pertimbangan sebelum membuat pengesyoran. Tidak terdapat saranan bahawa Lembaga Penasihat hanya menyampaikan representasi, yang mana mungkin berada dalam kemungkiran akan s 6(1) (lihat ms 657C–E).

(4) Pegawai yang berkenaan telah melaksanakan kuasa di bawah s 3(3)(b) untuk menahan bagi satu tempoh selama 28 hari. Beliau telah menyatakan bahawa ia adalah daripada 21 September 1997 pada 0325 jam. Beliau tidak menyatakan 'daripada 21 September 1997' yang mana hujah yang dibangkitkan mungkin relevan. Satu hari adalah jangka masa selama 24 jam. Jika masa yang dimulakan tidak ditentukan, maka s 54(1)(a) Akta Pentafsiran 1957 akan terpakai. Tetapi di mana masa yang tertentu di nyatakan untuk permulaan tempoh masa itu, maka tempoh itu akan bermula daripada masa yang dinyatakan itu. Autoriti-autoriti yang disebut boleh dibezakan atas dasar bahawa masa yang disebutkan adalah masa tatkala pegawai itu menandatangani dokumen tersebut, bukannya berhubung dengan masa perintah itu berkuatkuasa. Pegawai tersebut telah tidak melampaui kuasa-kuasa yang diberikan kepadanya di bawah s 3(3)(b). Beliau telah melaksanakannya sebelum luputnya perintah yang terdahulu, dan tempoh yang ditetapkan olehnya dalam perintah tersebut tidak melampaui kuasa yang telah diberikan oleh s 3(3)(b) Ordinan tersebut (lihat ms 658F–H).

Obiter:

Jika bantahan dibuat bahawa alasan-alasan tersebut telah tidak diplidkan, alasan-alasan itu pasti telah secara terusnya ditolak. Walaubagaimanapun, walaupun isu tersebut telah tidak diplidkan, sekiranya terdapat keterangan yang dimasukkan bagi menyokongnya, mahkamah mempunyai kewajipan untuk mempertimbangkan keterangan itu serta penghujahan tersebut dan mencapai satu keputusan. Dalam kes semasa, penentang-penentang setelah memfailkan secara tidak perlu akan pelbagai dokumen-dokumen yang bukan hanya menjawab dakwaan-dakwaan yang khusus itu sahaja dalam afidavit-afidavit sokongan tersebut, tetapi telah

mengenakan ke atas diri mereka sendiri untuk memberikan penghujahan menurut alasan-alasan yang tidak diplidkan (lihat ms 656A, E–F); *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 diikut.] A

Notes B

For a case on detention, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) para 1109.

For cases on detention order, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1110–1207.

C

Cases referred to

Abdul Rahman bin Abdul Karim v Abdul Wahab bin Abdul Hamid [1996] 4 MLJ 623 (refd)

Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 (refd) D

Ang Hiok Seng v Yim Yut Kiu (personal representative of the estate of Chan Weng Sun, deceased) [1997] 2 MLJ 45 (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (folld)

Koh Yoke Koon v Minister for Home Affairs, Malaysia & Anor [1988] 1 MLJ 45 (distd) E

Lau Lek Eng & Ors v Minister for Home Affairs, Singapore & Anor [1972] 2 MLJ 4 (refd)

Lye Fong Weng & Anor v Deputy Minister of Home Affairs & Anor [1994] 2 CLJ 626 (refd)

Morgan a/l Perumal v Ketua Inspektor Hussein bin Abdul Majid [1996] 3 MLJ 281 (folld) F

Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri & Anor [1994] 3 MLJ 285 (refd)

Saw Seng Kee v Nadzri & Ng Securities Sdn Bhd [1996] 2 MLJ 238 (refd)

Sri Alam Sdn Bhd v Newacres Sdn Bhd [1997] 1 MLJ 297 (refd) G

Tan Boon Liat @ Allen & Anor et al, Re v Menteri Hal Ehwal Dalam Negeri & Ors [1977] 2 MLJ 108

Teo Hock Guan & Anor v Johore Builders & Investments Sdn Bhd [1996] 2 MLJ 596

Teoh Yook Huwah v Menteri Hal Ehwal Dalam Negeri & Ors [1993] 1 MLJ 12 (refd) H

Thamboosamy v Superintendent of Pudu Prison [1976] 2 MLJ 156 (refd)

Legislation referred to I

Emergency (Public Order and Prevention of Crime) Ordinance 1969 ss 3, (3)(b), (c), (5), 4(1), 6(1)

Federal Constitution art 5(1)

Interpretation Act 1957 s 54(1)(a)

Teh Poh Teik (*Teh Poh Teik & Co*) for the appellant.
Mohd Abazafree bin Mohd Abbas (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Abdul Wahab J: The applicant, Khoo Chee Peng, has applied by a notice of motion, for the following:

> Untuk satu perintah bagi satu writ habeas corpus dikeluarkan dan ditujukan kepada penentang-penentang yang dinamakan di atas bagi mengemukakan Khoo Chee Peng di mahkamah ini dan menunjukkan sebab kenapa pemohon tidak seharusnya dibebaskan dengan serta-merta dan menanggung serta menerima semua arahan, perkara dan hal yang mahkamah ini akan menimbangkan tentangnya atas alasan-alasan yang dinyatakan dalam afidavit yang disertai di sini.

The notice of motion is supported by the affidavit of the applicant, which may be summarized as follows:

He was arrested on 19 September 1997 at about 2am at Wisma KK Kam, Jalan Kebun Teh, Johor Bahru. He was confronted by a large number of armed policemen and arrested, and he was not told the reasons for his arrest and neither was he allowed to consult with a lawyer of his choice. He alleged he was slapped by Chief Insp Hussein during interrogation; that after about nine days in custody, he was interrogated every day when he was assaulted and tortured.

He deposed that after about a month, he was transferred to balai polis Sentul, Kuala Lumpur where he was taken to a place unknown to him and interrogated. In the course of such interrogation he was assaulted, as a result of which he became weak, lost his appetite and had fainting spells. He also had gastric problems. When brought to the doctor, he did not tell the doctor anything as the police were nearby. He was warded at the Kuala Lumpur General Hospital between 23 and 26 October 1997. After his release back to the police lockup, he was not assaulted again.

At the Sentul police station he was served with a detention order under s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance') exhibited as KCP-1. KCP-1 is the order signed by the Deputy Minister of Home Affairs authorizing detention for a period of two years effective from 17 November 1997 at Pusat Pemulihan Akhlak, Simpang Rengam, Johor or such other places as he may direct from time to time.

These grounds then form the factual basis relied upon by the applicant. However, of these grounds, counsel chose to argue on the following grounds 3 and 4:

Ground 3

It was argued the applicant was in hospital from 23 October to 26 October 1997 and unless the respondents could show that the Minister had

authorized the same, the detention at the hospital was bad. It was submitted the respondents never denied the averments that between 23 October and 26 October 1997 the applicant was at the Kuala Lumpur General Hospital and under the circumstances deemed admitted. *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382 (SC) is a well established authority for the proposition that when an affidavit does not reply specifically to allegations, then those allegations not replied to must be taken to have been accepted.

For the moment, I shall assume that the applicant was in hospital from 23 October to 26 October 1997. On these dates, the applicant was detained under s 3 of the Ordinance. The detention under s 4 has not been made. Section 3(5) of the Ordinance states:

> Any person detained under the powers conferred by this section shall be deemed to be in lawful custody, and may be detained in any prison, or in any police station, or in any other similar place authorized generally or specially by the Minister.

It was submitted the applicant could not be said to be in lawful custody since the Kuala Lumpur General Hospital does not come within the meaning of 'any other similar place authorized generally or specially by the Minister'. *Koh Yoke Koon v Minister for Home Affairs, Malaysia & Anor* [1988] 1 MLJ 45 was cited in support of the argument that for the period between 23 October and 26 October 1997, the detention was bad.

In *Koh Yoke Koon v Minister for Home Affairs, Malaysia & Anor*, the applicant Koh Yoke Koon was arrested by the police acting on information received, at a stall in Jalan Solok, Tangkak, Muar, Johor on 1 October 1986 at about 12.20am. The applicant was then remanded in custody under s 117 of the Criminal Procedure Code (FMS Cap 6) for 14 days pursuant to an order made by a magistrate. He was released on 14 October 1986, but on the same day he was re-arrested and detained at Muar police station pending inquiries under s 3 of the Ordinance. Upon the conclusion of these investigations, the police submitted a report to the Ministry of Home Affairs. On 9 December 1986, the Deputy Minister for Home Affairs signed the detention order under s 4 of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 authorizing the detention of the applicant for a period of two years with effect from 12 December 1986. The applicant challenged the validity of the detention order by the Minister and the detention thereunder. It was held, granting the habeas corpus and setting the applicant free, that: (i) having regard to the provisions of the Ordinance, the requirements therein as to the place of detention even though procedural are mandatory in character and so breaches thereof cannot be condoned; (ii) the applicant's period of detention in police custody at the Muar police station from 14 December 1986, until some time in the morning of 16 December 1986 when he was removed to the rehabilitation centre was wholly unauthorized and therefore in violation of art 5(1) as being otherwise than in accordance with law; (iii) the detention order will not operate to salvage the case for the detaining authority for it specifically provided for detention at the centre for two years from 12 December 1986 and cannot therefore have the effect of rendering legal

A the applicant's illegal detention at the Muar police station from 14 December 1986 until his removal therefrom on the morning of 16 December 1986; and (iv) the detention of the applicant under s 4(1) was not procured by steps all of which were entirely regular nor was the court satisfied with 'every step in the process'.

B The applicant by his own claim was sent to hospital because of his alleged illness. But if the applicant's argument were adopted he should not have been sent to hospital or allowed to be warded when he was ill. Such an interpretation would lead to an inhumane and ludicrous result. It would be wrong for the court to read a statute so as to lead to a ludicrous result, and neither will this court lend itself to the idea an ill detainee or C prisoner cannot be sent to hospital when he is ill merely because of a narrow interpretation of the law. Being a place where he is sent for medical attention, and warded by his own averment for treatment, the hospital cannot be held to be a place of detention by the authorities. Certainly the factual situation is clearly distinguishable from *Koh Yoke Koon v Minister* D *for Home Affairs of Malaysia & Anor* where the detainee was not in a hospital, but held in a police station.

I would therefore reject this ground.

Ground 4

E It was alleged that the applicant was assaulted when he was detained under s 3 of the Ordinance. Paragraphs 5, 6 and 7 of the supporting affidavit relate to assaults while he was detained in Johor Bahru. Paragraphs 10 and 11 relate to the assaults while he was detained in Kuala Lumpur and paras 12, 13, 14 and 15 relate to the applicant's seeing the doctor and F subsequent admission to the Kuala Lumpur Gneral Hospital.

Firstly, assuming there was assault, the legal question is whether an allegation of assault is relevant in an application for habeas corpus. It was submitted that the allegations of assault are relevant as they relate not only to the 'circumstances of the arrest and detention' which the Inspector G General of Police or the designated office under s 3(3)(c) of the Ordinance must forthwith report to the Minister, but by assaulting the applicant, the detaining authority has violated art 5(1) of the Federal Constitution which states: 'No person shall be deprived of his life or personal liberty save in accordance with law'. It was urged that the law does not allow the detaining authority to assault anyone under detention.

H Although assault was alleged in *Teoh Yook Huwah v Menteri Hal Ehwal Dalam Negeri & Ors* [1993] 1 MLJ 12 (SC), the Supreme Court did not consider the matter, finding that the allegation of assault being hearsay, the factual foundation of the claim did not exist and any decision on the issue would be mere obiter dicta. In *Morgan a/l Perumal v Ketua Inspektor* I *Hussein bin Abdul Majid* [1996] 3 MLJ 281, Abdul Malik Ishak J held, following *Lau Lek Eng & Ors v Minister for Home Affairs, Singapore & Anor* [1972] 2 MLJ 4, that allegations as to the manner and conditions of detention were not matters within the scope of cases where habeas corpus would normally issue.

It has been said in *Thamboosamy v Superintendent of Pudu Prison* [1976] 2 MLJ 156 (FC) that the power given by law to detain must be construed strictly. This principle was applied in *Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri & Anor* [1994] 3 MLJ 285 (SC) and *Lye Fong Weng & Anor v Deputy Minister of Home Affairs & Anor* [1994] 2 CLJ 626. The authorities, however, dealt with the regularity and compliance with the strict requirements of the Ordinance that authorized detention. The Ordinance, it must be noted, does not prescribe the manner and conditions of detention. It would be extending the terms of the Ordinance and transgressing into the legislative jurisdiction to read into the Ordinance requirements for manner and conditions of treatment of persons under detention. The line between regularity and compliance with the strict requirements of the Ordinance on the one hand and the manner and conditions of detention on the other can at times be difficult to draw, and each case must be decided on its own particular facts. In my opinion, complaints of assault are in the general nature of complaints of manner and conditions of detention, and have little to do with compliance of the legal requirements authorizing detention. Remedies other than habeas corpus are available to the applicant. It would be wrong to apply the writ of habeas corpus for such cases.

Such being the case, the issue of whether there was an assault is irrelevant in an application for a writ of habeas corpus. It is then unnecessary to deal with the allegations of assault. I would, however, go into the allegations for rather different reasons.

The applicant had given details of the alleged assault in Kuala Lumpur. The respondents have submitted the affidavit of Chief Insp Hussein bin Abdul Majid, who denied that the applicant was ever assaulted.

The question was put in counsel's submission to the court that briefly, 'there are two versions as to whether the applicant was transferred to Kuala Lumpur. The applicant has asserted it and Chief Insp Hussein denied it. Which version is to be believed?' It was argued that bearing in mind that there is no specific denial to paras 12, 13, 14 and 15 of the applicant's affidavit that he was brought to see a doctor and subsequently admitted to the Kuala Lumpur General Hospital, it was more probable that the applicant's version is true. And, that being so, it was argued Chief Insp Hussein was in no position to deny that the applicant was assaulted while he was in Kuala Lumpur because Chief Insp Hussein was not there.

I had reserved judgment so as to review the application and affidavits in detail. The compelling conclusion is that the application is based on complaints of assaults as being the basis of the habeas corpus application. The affidavit of Chief Insp Hussein bin Abdul Majid must be read as replying to the substance of that allegation. Being held in Kuala Lumpur was not raised as an issue as a ground of the application, but was elaboration of the period of detention during which the alleged assaults occurred. I do not read para 7 of the chief inspector's affidavit as necessarily denying the applicant was ever held in Kuala Lumpur or that he was admitted to the Kuala Lumpur General Hospital. Now, the allegations were made in the affidavit of the applicant affirmed on 21 March 1998. The affidavit of Loh

Fook Yean provides only support in that he heard shouts of pain, but it does not prove anything since the applicant in his affidavit at para 7 said:

> Saya merasa amat sakit apabila diserang (dipukul). Saya menyerang dan menjerit kesakitan bila dipukul. Semasa saya disoal siasat juga saya mendengar tangisan dan jeritan seorang bernama Loh Fook Yean (No K/P 6111107) yang juga disoal siasat di bilik berdekatan.

The applicant himself said he attacked, and cried in pain when beaten. It sounds more like a fight with the applicant attacking. Yet it seems from para 1.6 of the chief inspector's affidavit of 20 May 1998 that, too, was denied. That is strange, because if it was true the applicant attacked and force was used to subdue him, there was no reason to deny. There was also no reply by the applicant to the denials, and it could be interpreted that the denial is not contested. In submissions, counsel after raising the issue of assault during detention in Johor ceased to pursue the matter in view of the second sentence in para 7 of the applicant's affidavit.

Similarly, even if the denials were interpreted as a denial that the applicant was ever held in the Kuala Lumpur General Hospital, the applicant had not contested the affidavit of the chief inspector. He could have filed affidavits from the doctor or the registrar from the hospital. As he failed to do so, it could be deemed he has accepted that denial. I am not unaware that the earlier submission by counsel that the respondents had not denied that the applicant was held in Kuala Lumpur, and therefore it must be deemed that they do not dispute it, is in clear contradiction of the submission in the question now put to the court that the chief inspector denied the applicant was at any time in Kuala Lumpur. I cannot but conclude there is little factual substance to support the applicant's factual allegations in support of the ground now being pursued even if assault is a factor to be considered in habeas corpus applications.

In submission, there were three other grounds. The fifth ground was withdrawn. However, counsel proceeded on the remaining grounds as grounds 1 and 2 and they are as follows:

> Ground 1
>
> That there is no evidence that the respondents had strictly complied with s 6(1) of the Ordinance and art 151(b) of the Federal Constitution.
>
> Ground 2
>
> The detaining authority (police) had failed to adhere strictly to s 3(3)(c) of the Ordinance resulting in the break in the chain of detention when the applicant was arrested and detained under s 3 of the Ordinance. Consequently, the continued detention is illegal.

These grounds now being argued were never part of the grounds pleaded by the applicant. The notice of motion prayed for the issue of a writ of habeas corpus directed to the respondents for the applicant to be produced before this court and for the respondents to show why the applicant should not be released. The notice of motion states that it is supported by the applicant's affidavit of 21 March 1998. That affidavit made the allegations as stated above, but does not make any allegations as being now argued under grounds 1 and 2 above.

If objection had been made that these grounds were not pleaded, these grounds would have been summarily dismissed. It is trite law that an issue to be tried before a court must first be pleaded. It is immaterial if it was not originally pleaded, since it may be added later by amendment. The purpose of the rule is solidly founded in fundamental justice: that the other party be given a fair opportunity to answer the allegations made therein. A party is bound by his pleadings. This applies particularly to allegations of fact. The law relating to those facts need not be specifically pleaded. Where the question is one of mixed fact and law, such as in estoppel, it has been held in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 (FC) that even if estoppel is not pleaded under O 18 rr 7(1) and 8(1) of the Rules of the High Court 1980, it would be allowed if the material facts giving rise to estoppel is sufficiently pleaded even though the word estoppel is not used specifically. Where it is not pleaded then a party may not be allowed to rely on it: *Ang Hiok Seng v Yim Yut Kiu (personal representative of the estate of Chan Weng Sun, deceased)* [1997] 2 MLJ 45 (FC); *Sri Alam Sdn Bhd v Newacres Sdn Bhd* [1997] 1 MLJ 297 (CA); *Saw Seng Kee v Nadzri & Ng Securities Sdn Bhd* [1996] 2 MLJ 238 (CA); *Teo Hock Guan & Anor v Johore Builders & Investments Sdn Bhd* [1996] 2 MLJ 596 (CA) and *Abdul Rahman bin Abdul Karim v Abdul Wahab bin Abdul Hamid* [1996] 4 MLJ 623.

In *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd*, it was held that where the issue was not pleaded, but there was a body of evidence that was admitted to support it, then the court has a duty to consider the evidence and submissions and come to a decision. The respondents, having unnecessarily filed the various documents instead of merely answering the specific allegations in the supporting affidavits, invited upon themselves the submissions in grounds 1 and 2 above.

Ground 1

Section 6(1) of the Ordinance provides:

> Whenever any person has made any representations under s 5(1) to an Advisory Board, the Advisory Board, shall within three months from the date on which such representations were received by Advisory Board or such longer period as the Yang diPertuan Agong may allow, consider such representations and make recommendations thereon to Yang diPertuan Agong.

Now para 6 of the affidavit of one Khalid Ahmad says:

> Lembaga penasihat selanjutnya setelah mendengar representasi pemohon pada 11 Februari 1998 telah mengemukakan syornya kepada Yang diPertuan Agong pada 17 Februari 1998. Setelah menimbangkan syor-syor Lembaga Penasihat, Yang diPertuan Agong telah mengesahkan perintah tahanan yang telah dibuat oleh Yang Berhormat Timbalan Menteri Dalam Negeri di bawah s 4(1) Ordinan tersebut terhadap pemohon.

It was argued that the affidavit merely states that after hearing the representations of the applicant, the Advisory Board made its recommendations. Exception was taken to the fact the affidavit did not say the Advisory Board had actually considered the representations.

If the Advisory Board failed to carry out its functions, it was held the continued detention could not be said to be in accordance with the law and the subject would be set at liberty: *Re Tan Boon Liat @ Allen & Anor et al v Menteri Hal Ehwal Dalam Negeri & Ors* [1977] 2 MLJ 108 (FC). In that case, the Advisory Board did not make recommendations within three months, yet the orders were confirmed by the Yang di-Pertuan Agong.

In the case before us, the recommendations had in fact been made. The real question is whether the affidavit of Khalid Ahmad should have contained the specific assertion that the Advisory Board has considered the representations. Now it is one thing to have or have not considered, and another whether in the affidavit it must be specifically mentioned. The concept 'consider' implies a conscious act of reflecting or viewing and thinking over the representations. In my view, the affidavit must make assertions of evidence that consideration had occurred in compliance with the direction of s 6(1). But failure to use the word does not mean the Advisory Board had not considered the matter. There is unchallenged evidence that the Advisory Board had heard the representations and made recommendations. That is distinguishable from not making recommendations. The process of hearing representations and making recommendations thereon necessarily implies consideration before making recommendation. There is no suggestion that the Advisory Board merely conveyed the representations, which would have been in breach of s 6(1).

I would therefore reject this ground.

Ground 2

The background facts relating to ground 2 are as follows:

Action	Date	Time
Arrest	19 September 1997	3.25
Extension 24 hours exh RAW-1 (effective 20 Sept 1997 to 21 Sept 1997)	19 September 1997	16.00 3.25
Extension 28 days exh TCB-1 (effective 21 September 1997 to 19 Oct 1997)	21 September 1997	1305 3.25
Further 30 days' extension exh MAAL-1: (effective 19 Oct 1997 3.25 to 18 Nov 1997)	17 October 1997	9.00 3.25
2-year detention order exh TR-1	17 November 1997	

From the above, it is clear the extensions were made before expiry of the term of the previous authorization. The last authorization would expire at 0325 hours on 18 November 1997. The two-year order was issued on 17 November 1997.

The question raised by the applicant is in relation to the 28-day detention at exh TCB-1. Counsel for the applicant submitted:

(b) The respondents contend that the authorization under s 3(3)(b) only ends on 18 October 1997 12 midnight and therefore when ASP Jamaluddin Arshad sent the report to the Minister on 18 October 1997 at 7.45am it was valid because the detention of the applicant is until 18 October 1997, 12 midnight and not until 18 October 1997 at 3.25am.

The contention is without basis. Strict interpretation must be given exh TCB4 (affidavit of ASP Tai Cheng Boon) who authorized the further detention for 28 days commencing 21 September 1997 at 3.25am.

It is stretching the imagination too far to say that 28 days from 21 September 1997 3.25am could cover until 18 October 1997 at 12 midnight.

(c) In any event KC Vohrah J in *Lim Kean Hong v Timbalan Menteri Dalam Negeri* [1990] 1 CLJ 1161 at p 1163 when interpreting s 3 of the Dangerous Drugs (Special Preventive Measures) Act 1985 held that only the proviso to s 3(2)(c) refers to 'days' but calculated from midnight to midnight but the provisos to s 3(2)(a) and (b) refer to hours.

(d) Such being the case, as the proviso to s 3(3)(b) of the Ordinance mentions 'hours', ASP Tai Cheng Boon's authorization lapsed on 18 October 1997 at 3.25am.

(e) Therefore when ACP Jamaluddin Arshad sent the report on 18 October 1997 at 7.45am the authorization by ASP Tai Cheng Boon under s 3(3)(b) of the Ordinance had lapsed.

The relevant portion of exh TCB-1 provides as follows:

> ... dengan ini saya memberi kuasa untuk melanjutkan tahanan orang yang disyaki di atas, bagi jangkamasa tambahan selama 28 hari mulai dari 21 September 1997 pada jam 0325.

The terms of the order are unambiguous. It is perfectly clear. The officer concerned exercised the power under s 3(3)(b) to detain for a period of 28 days. He had stated it was from 21 September 1997 at 0325hrs. He did not say from 'from 21 September 1997' when the argument raised might have been relevant. A day is a period of 24 hours. If the commencement time is not specified, then s 54(1)(a) of the Interpretation Act 1957 would apply. But where a specific time is stated for the commencement of the time period, then the period begins from that time. The authorities cited may be distinguished on the basis the times mentioned were the time when the officer signed the document, not as to time the order was effective from. The officer had not exceeded the powers given to him under s 3(3)(b). He had exercised it before the expiry of the previous order, and the period he specified in the order did not exceed the power conferred by s 3(3)(b) of the Ordinance.

I would dismiss this ground also.

The application under the notice of motion for the issue of a writ of habeas corpus is therefore dismissed.

Application dismissed.

Reported by Jafisah Jaafar